No. 92-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE NATIONAL COUNCIL OF JEWISH WOMEN IN SUPPORT OF PETITIONER

ELAINE R. JONES
ERIC SCHNAPPER*
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

Counsel for Amici

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

No. 92-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL COUNCIL OF JEWISH WOMEN IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense Fund, Inc., is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). A significant portion of the Fund's litigation has concerned Title VII of the Civil

[1] Letters of consent to the filing of this Brief have been filed with the Clerk of the Court.

Rights Act of 1964 and the proper scope of constitutional and statutory rights to equal employment opportunity.

The National Council of Jewish Women (NCJW), Inc., is a volunteer organization inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 100,000 members in over 500 communities around the country. The National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitutional are keystones of a free and pluralistic society. Based on the NCJW's National Resolutions stating our resolve to work for the "enforcement of sexual harassment laws and more stringent penalties for violators," we submit this brief.

SUMMARY OF ARGUMENT

Since this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the experience of the lower courts has revealed there are five distinct types of practices that are loosely described as "harassment." These are (1) discrimination in employer mandated terms of employment, (2) facially neutral harassment on account of race or gender, (3) race or gender specific harassment, (4) sexual harassment, and (5) quid pro quo sexual demands.

The magistrate's decision in the instant case was based on the Sixth Circuit decision in *Rabidue v. Osceola Refining Co.*, 805 F. 2d 611, 619 (6th Cir. 1986), which held that harassment is legal under Title VII unless it "affected seriously the psychological well being" of the victim. The rule in *Rabidue* improperly requires victims of harassment to endure that abuse for possibly extended periods of time until the requisite amount of injury has occurred. Until that point is reached *Rabidue* treats the workplace as a "free fire zone." Department of Defense Inspector General, *Tailhook 91*, pt. 2, p. X-1 (1993).

The magistrate held that denigrating and demeaning treatment of women was a recurrent condition of employment at Forklift Systems, but insisted that no violation of Title VII had occurred because that treatment was not "abusive". This Court's decision in *Meritor* recognizes no such distinction.

ARGUMENT

INTRODUCTION

Seven years ago, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court held that the prohibitions of Title VII are not limited to discriminatory conduct that causes economic injury, but reach any form of mistreatment on the basis of race, sex, national origin or religion.

The application of Title VII to non-economic injury is important for two distinct reasons. First, minorities and women are not afforded equal treatment if, in order to hold the same job or receive the same wages as whites or men, they must endure abuses or bear additional burdens not imposed on others.[2] Harassment on the basis of race or gender aggravates longstanding injuries and sensitivities rooted in the history of the very discrimination and intolerance which led to the enactment of the 1964 Civil Rights Act.

Second, mistreatment of a non-economic nature is likely to lead, in ways difficult to detect, delineate or remedy, to discrimination in promotion and dismissal, with attendant economic harm. The experience of the lower courts in harassment cases has confirmed what common sense would have suggested; given a choice among otherwise

---

[2] "Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women." *Bohen v. City of East Chicago, Ind.*, 799 F. 2d 1180, 1165 (7th Cir. 1986).

comparable jobs, minorities and women will understandably choose to work at a plant or office where abuse or other forms of mistreatment are *not* a foreseeable condition of the job. At least if they had any other real alternatives, many women would not take a job at Forklift Systems if they knew they would be treated the way petitioner was, or, in the case of blacks, choose to work at McLean Credit Union under the circumstances alleged by Brenda Patterson. *Patterson v. McLean Credit Union*, 491 U.S. 164 1989). In actual harassment cases the victims frequently seek to transfer to other jobs, even if less desirable[3], or simply resign.[4] A pattern of harassment could purge minorities or women from a position or employer as effectively is more direct exclusion. For those who choose to stay, harassment frequently poisons their relations with supervisors and fellow employees.[5] In the instant case, Hardy's overt harassment of petitioner led other employees to treat her in a similar

---

[3] See, e.g., *Ellison v. Brady*, 924 F. 2d 872, 881-82 (9th Cir. 1991); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F. 2d 1503, 1508 (11th Cir. 1989); *Yates v. Avco Corporation*, 819 F. 2d 630, 632 (6th Cir. 1987).

[4] See, e.g., *Daniels v. Essex Group, Inc.*, 937 F. 2d 1264 (7th Cir. 1991); *Brooms v. Regal Tube Co.*, 881 F. 2d 412 (7th Cir. 1989);*Proline v. Unisys Corp.*, 879 F. 2d 100 (4th Cir. 1989).

[5] "[A]n employee may react angrily to the racial harassment, and may more easily be provoked into arguments or physical altercations with those co-workers responsible for the harassment." *Daniels v. Essex Group, Inc.*, 937 F. 2d 1264, 1272 (7th Cir. 1991). See also *Erebia v. Chrysler Plastics Products Corp.*, 772 F. 2d 1250, 1252 (6th Cir. 1985)(victim "called an hourly employee a 'gringo' after the employee had called him a 'wet back'"); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F. 2d 599,602 (7th Cir. 1985)(after perpetrator had made repeated sexual advances, brushed up against victim's breasts, and demanded sex in return for a raise, victim threatened to "put him in his place with a weapon").

manner (tr. p. 25), and undermined her authority.[6] Harassment of employees on the basis of race or gender may affect the ambitions and self-esteem of the victims "in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

Notwithstanding the importance of eradicating these types of discrimination, the lower courts have responded in strikingly inconsistent ways to this Court's decision in *Meritor*. Essentially identical facts have been declared a serious violation of Title by one court, but upheld as entirely lawful by another. What is legal or not under Title VII varies not only from circuit to circuit, but from judge to judge. The particular result in this case was dictated by the Sixth Circuit decision in *Rabidue v. Osceola Refining Co.*, 805 F. 2d 611, 619 (6th Cir. 1986), that harassment is permitted by Title VII except where it "affected seriously the psychological well being" of the victim.

We emphasize that all that is at issue in this case is the standard for determining what is lawful under Title VII. In order to obtain one of the various forms of relief available for a violation of Title VII, such as injunctive relief, compensatory damages, punitive damages, back pay, or, in the case of an alleged constructive discharge, reinstatement, a plaintiff may have to establish additional elements. What those elements may be, and whether they were established here, are not before the Court, because the courts below held that the pattern of conduct in this case was entirely lawful, and thus did not reach those remedial questions.

---

[6] Sexual harassment can "create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers." *Barbetta v. Chemlawn Services Corp.*, 669 F.Supp. 569, 573 (W.D.N.Y. 1987).

I. The Actions Characterized by This Court and the Lower Courts as "Harassment" Encompass Several Distinct Types of Practices

Section 703(a) of Title VII forbids an employer "to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Disparate treatment, which is the gravamen of this action, is the most obvious evil that Congress had in mind when it enacted Title VII. Disparate treatment occurs when an employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). There is no requirement that an employer have harbored any "animus against" the group subjected to unfavorable treatment; an employer which engages in disparate treatment of a protected group is liable under Title VII even though it may have been "favorably disposed toward" its victims. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987).

Meritor of course held that the disadvantage imposed by the disparate treatment need not be economic. The Court used a variety of terms to describe disadvantageous circumstances that might cause injury of a non-economic nature, including "hostile" , "offensive", "intimidating", and "abusive", or involving "ridicule" or "insult"[7]. These terms were illustrative of the types of circumstances that might cause non-economic injury. Although *Meritor* and the EEOC Guidelines use the phrase "hostile environment" to summarize these circumstances, the term "hostile" is employed in the broad sense of inhospitable or discriminatory. Disparate treatment is equally unlawful whether the perpetrator intended to harm the victim or merely thought discrimination and derogatory abuses were amusing. Derogatory jokes which cast a protected group in an unfavorable light are disparate treatment fully as much as

[7] 477 U.S. at 62-73.

non-humorous slurs.[8]

A. The Types of Practices Involved in "Harassment" Cases

The decisions of this Court and the lower courts have characterized as "harassment" at least five different types of practices. We set forth in an Appendix to this brief a list of reported appellate decisions in which these practices were found or alleged to have occurred, and summarize them briefly below.

(1) Discrimination in Employer Mandated Terms of Employment—

An inherent part of the employment relationship is that the employer is entitled, subject to certain legal constraints, to direct how an employee, and his or her fellow employees, will act during the period they are at work. Employers routinely determine to a large degree what tasks employees will perform and how they will do so, as well as controlling, often in considerable detail, how employees will act while at the plant or office.

A number of the so-called harassment cases involve situations in which the employer utilized this authority to mandate for women or minorities terms of employment that were both different than and disadvantageous compared to the treatment of other comparable workers. For example, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the black plaintiff alleged she had been required to do more work than whites, and had been assigned to dust and sweep when white bank employees in the same position were not. In the instant case petitioner alleged she was repeatedly sent out to get coffee, a menial task fraught with stereotyped

[8] See, e.g., *Lipsett v. University of Puerto Rico*, 864 F. 2d 881 906 (1st Cir. 1990)("Belittling comments about a person's ability to perform, on the basis of that person's sex, are not funny."); *Hamilton v. Rodgers*, 791 F. 2d 439, 441 (5th Cir. 1986); *Snell v. Suffolk County*, 611 F. Supp. 521, 528-30 (E.D.N.Y. 1985).

overtones, that was never imposed on male managers.[9] See, e.g., EEOC Dec. No. 71-2042, 3 FEP Cas. 1102, 1103 (1971)(black but not white employees required to address white female supervisor as "ma'am"); *Carroll v. Talman Federal Savings & Loan Ass'n*, 604 F. 2d 1028 (7th Cir. 1979)(female but not male bank employees required to wear uniforms).

(2) Facially Neutral Harassment on Account of Race or Gender—

Supervisors and fellow employees seeking to abuse minorities or women have often chosen to use facially neutral methods, resorting to abusive conduct or derogatory remarks that could conceivably have been, but in fact were not, inflicted on men or non-minorities. Thus in *Patterson* the plaintiff alleged her supervisor glared at her, criticized her more than whites, and chastised only her, and never whites, in public. 491 U.S. at 212, 214. In the instant case Hardy times belittled petitioner with facially neutral remarks, not directed at male employees, such as "What the hell do you know." (Tr. 18).

(3) Race or Gender Specific Harassment—

In many of the reported lower court cases the substance of the abuse was something that by its very nature would harm only (or primarily) women or minorities. In *Patterson*, for example, the plaintiff's supervisor allegedly asserted to her that "blacks are known to work slower than whites by nature", and that whites could her job better than she could. 491 U.S. at 213. In the instant case Hardy told petitioner that a man was needed to do her job, and remarked "what do you know, you're a woman."[10] At the

[9] The magistrate asserted that this occurred on only a single occasion. (Pet. App. A-8) This was clear error; petitioner testified that this was Hardy's routine practice, and no witness disputed her assertion.(Tr. 19-20).

[10] Tr. 17, 18, 78, 91; Pet. App. A-9, A-18.

1991 Tailhook convention several of the male officers wore T-shirts reading "HE-MAN WOMEN HATER'S CLUB" and "WOMEN ARE PROPERTY."[11]

(4) Sexual Harassment—

This Court's decision in *Meritor*, like many of the lower court cases, dealt with disparate treatment in the form of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 477 U.S. at 65, *quoting* 29 C.F.R. §1604.11(a). The touchstone of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 477 U.S. at 98. Such advances, requests and conduct are by definition directed at employees, in virtually all reported cases women, because of their sex. The record in this case is replete with incidents of this type.

(5) Quid Pro Quo Sexual Demands—

In a number of cases supervisors have demanded sexual favors in return for a favorable employment action, such as a promotion, or on pain of an adverse employment action, such as dismissal. Most of these cases are a subset of discriminatory promotion and dismissal cases. If the woman rejects the demand and is denied the promotion[12]or fired[13], she has been denied the promotion or fired on account of her gender; a man in the same situation would have been promoted or retained.

[11] Department of Defense Inspector General, *Tailhook 91* , pt. 2, p. X-3 (1993).

[12] See, e.g., *Henson v. City of Dundee*, 682 F. 2d 897 (8th Cir. 1982); *Bundy v. Jackson*, 841 F. 2d 934 (D.C.Cir. 1981).

[13] See, e.g., *Sparks v. Pilot Freight Carrier, Inc.*, 830 F. 2d 1554 (11th Cir. 1987); *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F. 2d 599 (7th Cir. 1985).

B. *The Legal Principles Applicable to Each*

The experience of the lower courts reveals that several different types of harassment often arise in a single case. That is true in the instant case, which involves discrimination in employer-imposed terms of employment, facially neutral harassment on account of gender, gender specific harassment, and sexual harassment. The combined impact of multiple types of harassment may be relevant to determining liability[14], and will ordinarily be important to ascertaining the appropriate remedy, such as the proper level of compensatory damages. Nonetheless, the legal principles applicable to each form of harassment differ to some degree, and must be assessed separately.

Meritor held that in a hostile environment case a plaintiff was required to establish that the harassment at issue was "sufficiently pervasive or severe" to alter the conditions of [the victim's] employment." 477 U.S at 67. This requirement is applicable to a claim of facially neutral harassment on account of race or gender, race or gender specific harassment, or sexual harassment. It does not apply, however, to discrimination in employer imposed terms of employment; where an employer, for examples, selects an employee on the basis of race or sex for assignment to a demeaning or dangerous task, that assignment is a per se violation of Title VII, whether it lasts for a day or a year. The "pervasive or severe" requirement is also inapplicable to a quid pro quo case,[15] if the victim refused the supervisor's demand, and as a consequence was fired or denied a promotion. In that situation the dismissal or promotion would constitute unlawful discrimination on account of sex, since a similarly situated male would have been promoted or

---

[14] *Hicks v. Gates Rubber Co.*, 833 F. 2d 1406, 1416-17 (10th Cir. 1987); *Carter v. Duncan-Huggins, Ltd.*, 727 F. 2d 1225, 1236 (D.C.Cir. 1984).

[15] The Sixth Circuit acknowledged this distinction in *Rabidue*. 805 F. 2d at 620.

retained.

Practical experience since *Meritor* has demonstrated the value of the two part "pervasive or severe" standard. In most harassment cases, whether an abuse is an isolated incident, or has become an ongoing condition of the job, turns on pervasiveness, the frequency with which it recurs. Where an employee can anticipate that an abuse is going to occur again on the job, the perpetration of such abuses can properly be described as a condition of the job.[16] This is consistent with what would, as a practical matter, begin to affect the employment decisions of current or prospective employees. Both types of individuals would begin to avoid a given employer once it was foreseeable that its employees would be subject to harassment. If at that point the harassment could not be declared illegal and enjoined, the abuse would continue unchecked to steer minorities or women away from the employer. The EEOC Guidelines require an employer who has learned of harassing conduct to take "appropriate corrective action," 29 C.F.R. §1604.11(d), a requirement which imposes on the employer an obligation to act where recurrences of the harassment are foreseeable.[17] That obligation would make no sense unless

---

[16] *Compare North v. Madison Area Ass'n for Retarded Citizens*, 844 F. 2d 401 (7th Cir. 1988)(two or three incidents in ten years not sufficient to constitute a condition of employment) *with Carrero v. New York City Housing Authority*, 890 F. 2d 569 (2d Cir. 1989)(condition of job altered where half a dozen of unwanted sexual advances from the same supervisor created a situation in which victim was "required to be constantly on guard against having her supervisor fondle her knee, kiss her on the neck, or seek to kiss her on the lips.").

[17] See EEOC Policy Guidance on Current Issues of Sexual Harassment, p. 30 (March 19, 1990)("The employer should make follow-up inquiries to ensure that harassment has not resumed . . . ."); *Ellison v. Brady*, 924 F. 2d 872, 881 (9th Cir. 1991)(employer must take action "reasonably calculated to end the harassment"); *Paroline v. Unisys Corp.*, 879 F. 2d 100, 107 (4th Cir. 1989)(where employer knew perpetrator had harassed other women, employer "should have

the pervasiveness requirement of *Meritor* could be satisfied by proof the sufficient harassment had occurred that additional future acts could be foreseen.

The second branch of the *Meritor* standard, providing that severity may also be sufficient to render harassment a condition of the plaintiff's employment, has also proved important. The EEOC has concluded that a single but severe incident may be sufficient to alter the conditions of employment, such as "the unwelcome, intentional touching of a charging party's intimate body areas."[18] The lower courts have found that a plaintiff's conditions of employment are altered by circumstances creating a legitimate fear of serious and irreparable injury, such as a threat of death or rape, even though the threatened conduct has not occurred.[19] Continuous fear of severe injury can in such cases be as much a condition of the job as actual day to day abuse of a less extreme variety. Such fear would obviously shape employment decisions by current or prospective employees. There are a significant number of lower court cases involving threats or actual attacks of this severity.[20]

---

anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"); *Lopez v. S.B. Thomas,Inc.* 831 F. 2d 1184,1186 (2d Cir. 1987)("when an employer knows or reasonably should know that co-workers are harassing an employee . . . the employer may not stand idly by").

[18] EEOC, Policy Guidance on Current Issues of Sexual Harassment, p. 17 (March 19, 1990).

[19] *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1510-11 (11th Cir., 1989)(death); *Ellison v. Brady*, 924 F. 2d 872, 883 (9th Cir. 1991)(rape).

[20] *Daniels v. Essex Group, Inc.*, 937 F. 2d 1264, 1266-67 (7th Cir. 1991)(death threat, threat of assault, bullet fired into employee's home); *Andrews v. City of Philadelphia*, 895 F. 2d 1469, 1474 (3d Cir. 1990)(plaintiff burned by lime poured on her clothes); *Paroline v. Unisys Corp.*, 879 F. 2d 100, 105-06 (4th Cir. 1989)(assault and battery); *Bohen v. City of East Chicago, Ind.*, 799 F. 2d 1180, 1183

In applying *Meritor* the courts must determine whether the alleged conduct was unfavorable to the employee, e.g. whether an employer-imposed condition was undesirable, whether remarks about a plaintiff were derogatory, and whether unwelcome conduct or remarks were sexual in nature. In practice the court have had no difficulty in making these determinations; in the actual reported cases the unfavorable or sexual nature of the incidents in question has almost invariably been so blatant that it was never contested.[21] There is no dispute here, for example, that saying that only a man could do petitioner's job was a gender specific denigration of female employees, or that suggestions that petitioner start "screwing around" with Hardy referred to sexual activity. Should such disputes actually arise, the finder of fact should experience little difficult in determining whether, for example, a series of remarks might fairly be understood as derogatory or sexual in nature.

II. THE SIXTH CIRCUIT REQUIREMENT OF PROOF OF SERIOUS PSYCHOLOGICAL INJURY IS INCONSISTENT WITH TITLE VII AND THIS COURT'S DECISION IN *MERITOR SAVINGS BANK V. VINSON*

A. The Rationale of the Opinion in Rabidue Flatly Repudiates The Principles of Title VII

The rule adopted in *Rabidue* and applied by the magistrate below, as we set out below, is clearly wrong. The reasoning of *Rabidue* is equally significant, because the rule

---

(7th Cir. 1986)(rape threat); *Snell v. Suffolk County*, 782 F. 2d 1094, 1098 (2d Cir. 1986)(fear fellow police offices would not assist in an emergency).

[21] One of the few such cases is *Ellison v. Brady*, 924 F. 2d 872, 875 n. 5 (9th Cit. 1991), in which the employer argued in vain that a letter which contained "several references to sex" was "not of a sexual nature."

in question derives from a candid rejection of Congress's decision to eliminate harassment and abuse in the workplace. The panel in *Rabidue* offered a spirited defense of harassment of women, particularly on the job, as a widespread, normal, and generally accepted practice, insisting it was impossible to stop and that Congress surely could not have meant to do so. This is, the panel suggested, just the way women are normally treated. The reasoning of this decision bears an uncanny resemblance to the cavalier attitude of a company official in *Walker v. Ford Motor Co.*, 684 F. 2d 1355 (11th Cir 1982), who told a black employee that constant references to himself and other blacks as "niggers" was "just something a black man would have to deal with in the South." 684 F. 2d at 1359.

Rabidue argued, first, that women are demeaned in American society generally, and that comparable harassment on the job surely cannot be actionable:

> [The actions] had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, at the cinema, and in other public places.

805 F. 2d at 622. On this view, whatever is said or depicted in, for example, Hustler magazine or hard core pornography could be said to, or insistently displayed before, any woman who chooses to work for a living.

This argument ignores the fact that a woman who may refuse to enter a pornographic bookstore or movie theater is *required* to be at her place of employment during business hours. Employees are the quintessential captive audience. Individuals are free to stay away from, or walk out of, a store or political rally because of the slightest difference in opinion or taste; but those same individuals are required by their employers, on pain of dismissal, to remain

on the job despite the most withering abuse. Probably nothing short of physical confinement or the threat of criminal prosecution could as effectively compel an individual's continued presence as fear of dismissal; employees depend on their jobs to feed, clothe and house themselves and their families. So long as an employee is required by his or her employer to be at a particular plant or office, Title VII imposes on the employer an obligation to assure that the conditions at that site are not tainted by discriminatory harassment. By so doing Title VII merely accords to petitioner and other women while on the job the same ability to avoid unwelcome sexual remarks and displays that they possess when not at work.

Rabidue argued, second, that verbal and other abuse is widespread at the workplace, more or less normal there, and reflects societal mores, and that Title VII was not adopted to change such common and widespread workplace bigotry:

> As Judge Newblatt aptly stated . . . "Indeed, it cannot seriously be disputed that in some work environments , humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to--or can--change this. It must never be forgotten that Title VII is the federal mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers."

805 F. 2d at 620-21. We urge, on the contrary, that Congress intended to bring about just such a transformation. In 1964 racial bigotry also "abound[ed]" in some, indeed all too many, "work environments"; Congress certainly

contemplated that the non-discriminatory terms and conditions of employment guaranteed by Title VII would bring to an end race-based abuse of minority workers by their coworkers and supervisors. Nothing in the language or legislative history of Title VII suggests that harassment of women was to treated any differently. Title VII does not require American workers to alter their social mores regarding race, sex, or any other matter; they remain free, as to employers, to adhere to whatever views they choose on matters of race, religion, or gender. What Title VII emphatically does require is that employees and supervisor who may adhere to such intolerant beliefs not act on them at the workplace in a manner harmful to their fellow workers.[22]

Rabidue urged, third, that women who go to work frequently know they are going to be sexually harassed, and voluntarily choose to take the jobs anyway. Thus *Rabidue* asserted that in deciding whether a given set of abuses is legal, a court should consider "the lexicon of obscenity that pervaded the environment of the workplace . . *before* the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon *voluntarily* entering that environment." 805 F. 2d at 620 (Emphasis added). On this view Title VII is subject to an unstated loophole analogous to the tort doctrine of assumption of the risk; employees who should have known when they took a job that they might be discriminated cannot complain when discrimination in fact occurs. If Title VII indeed contained such an assumption, it would have been inapplicable to most black employees in the nation when it became effective in 1965.

[22] "[A]n employer . . . cannot change the personal beliefs of his employees; he can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy." *DeGrace v. Rumsfeld*, 614 F. 2d 796, 805 (1st Cir. 1980).

Assumption of the risk has proved a useful doctrine in allocating responsibility where individuals voluntarily choose a course of action with known dangers, such as the risk of being struck by a ball at a baseball game. But for women, as for men, working is not a "voluntary" optional pastime like going to baseball games. Women need to work for exactly the reason that men do, to feed, house and clothe themselves and their families. For women working is only as voluntary as eating is voluntary; without jobs most could not provide themselves and their families with a decent standard of living, and many could hardly survive.[23] Assumption of the risk as a defense for employers to injuries sustained by employees was decisively rejected by virtually every state in the union in the early twentieth century with the adoption of workmen's compensation laws. *Prosser On Torts*, section 80.

B. The Substance of the Rabidue Rule Is Inconsistent With Title VII

As *Meritor* explained, disparate treatment on account of race, sex, etc. is discrimination, and thus illegal under Title VII, regardless of whether the harm it causes is economic or non-economic. The plain language of the law forbids "discrimination", not "discrimination if it happens to cause serious psychological injury". Where economic injury

[23] In *Burns v. McGregor Electronic Industries, Inc.*, 955 F. 2d 559 (9th Cir 1992), the plaintiff was subject to constant hideous verbal abuse, a rape threat, and warning of dismissal if she did not engage in sex with her supervisor. One supervisor constantly touched the women employees, and on at least one occasion dropped his pants in front of several female workers. A female coworker described the plant as the "last resort of anybody that needs a job". 955 F. 2d at 562. The plaintiff quit on several occasions, reluctantly returning because "she needed work to support herself, her father, and her brother." 955 F. 2d at 561.

See also *Phillips v. Smalley Maintenance Services, Inc.*, 711 F. 2d 1524, 1527(11th Cir. 1983)(supervisor insisted that plaintiff "engage in oral sex with him on penalty of losing her job, upon which he knew she and her family were significantly, financially dependent.")

is concerned, there surely is no such "serious injury" rule; an employee wrongfully denied $1 in wages on account of race, sex, religion or national origin would be entitled to sue for back pay under Title VII, and could obtain an injunction against such denials in the future, modest in amount though those denials might be. *Meritor* rejects any different rule merely because the injury is non-economic.

Rabidue holds that Title VII authorizes an employer to permit, condone or even enthusiastically sponsor sexual or racial harassment up until the point where it "affect[s] seriously the psychological well being of the plaintiff". 805 F. 2d at 619. The threshold of illegality under *Rabidue* is quite high; in the only Sixth Circuit decision holding this requirement satisfied, the plaintiff was repeatedly forced to seek medical help, and was twice hospitalized because of the psychological harm she had suffered.[24] Short of such extraordinary injury, *Rabidue* creates what has elsewhere been described as a "free fire zone" for abuse of female and minority employees. Department of Defense Inspector General, *Tailhook 91*, pt. 2, p. X-1 (1993). Surely Congress never intended to require victims of discrimination to endure such conditions until their injuries had reached some egregious levels. "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." *Ellison v. Brady*, 924 F. 2d 872,878 (9th Cir. 1991)[25].

Under Title VII as it existed prior to 1991, the *Rabidue* rule would yield results that Congress could not possibly have intended. Until 1991 a plaintiff sustaining only non-economic injuries as a result of racial or sexual

---

[24] *Yates v. Avco Corporation*, 819 F. 2d 630, 632 (6th Cir. 1987).

[25] "A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided by Title VII." *Carrero v. New York City Housing Authority*, 890 F. 2d 569, 578 (2d Cir. 1989).

harassment could not obtain any form of monetary relief under Title VII. Under that circumstance, *Rabidue* interpreted Title VII to require victims of such harassment to endure injury-causing harassment until it led to "serious psychological injury", even though there was no hope that that injury could ever be redressed. Even when the required level of serious injury had been reached, the plaintiff was authorized only to *begin* the process of invoking Title VII by filing an administrative charge; in most instances years would go by before the matter could reach court, a trial could be held, and injunctive relief obtained.

Rabidue is equally indefensible under Title VII as amended by the 1991 Civil Rights Act, which now authorizes awards of compensatory damages. Congress in 1991 expressly authorized compensation for all damages, not just for damages amounting to serious psychological injury. Section 102 of the 1991 Civil Rights Act authorizes compensatory damages for "emotional pain, suffering . . . [and] mental anguish". 42 U.S.C. §1977A(b)(3). All such damages could be suffered even though a plaintiff's psychological well being had not been seriously injured. Moreover, Congress in 1991 was clearly concerned about the size of potential judgments against employers; it was for this reason that section 102 imposes a partial cap on the size of certain compensatory awards. Rather than permit a plaintiff to sue when her injuries and compensatory damage claim may still be modest, however, *Rabidue* has the perverse effect of requiring a plaintiff to postpone suing until both her injuries and damages are quite considerable. By the time proven harassment had "affected seriously the psychological well being" of a plaintiff, his or her injuries in monetary terms are likely to be quite large. Congress cannot have intended to require that a woman or minority who has sustained a $1000 injury postpone suit until his or her injuries have reached $100,000, and it is difficult to see why employers, except the defendant in the particular circumstances of this case, would want such a rule.

The *Rabidue* rule is also inconsistent with the principles applicable to constructive discharge claims. Serious psychological injury, unlike lost wages, is never fully undone by a monetary award. Emotional scars from such injuries are likely to last a lifetime; notwithstanding whatever psychologists and psychiatrists can accomplish, a minority or female employee whose psychological well being has been seriously harmed is unlikely to ever be the same again. Absent truly desperate financial circumstances, which of course are all too common, no woman or minority would choose to remain on a job until she or he had suffered irreparable psychological harm. Thus long before, under *Rabidue*, a woman could sue for sexual harassment, she would in all likelihood have resigned and brought a successful constructive discharge suit. See *Bell v. Crackin Good Bakers, Inc.*, 777 F. 2d 1497, 1500 (11th Cir 1985)(sustaining constructive discharge claim where plaintiff had resigned to *avoid* "permanent severe physical and mental problems.")

III. THE MAGISTRATE'S EVALUATION OF THE CIRCUMSTANCES OF THIS CASE WAS INCONSISTENT WITH TITLE VII

The magistrate's assessment of the largely undisputed facts in this case reflects a fundamental misunderstanding, rooted in *Rabidue*, of the requirements of Title VII. The magistrate correctly held that Hardy, the president and owner of Forklift, "demeans the female employees at his work place" (Pet. App. A-14), a constant practice that indisputably was a condition of petitioner's job. The magistrate insisted, however, that this was insufficient to establish a violation of the law, reasoning that Title VII actually permits demeaning and discriminatory terms and conditions of employment so long as they are not so severe as to amount to a "hostile" or "abusive" environment. In order to implement this distinction, the magistrate fashioned a system for rating derogatory remarks from "merely annoying and insensitive" to "truly gross". (Pet. App. A-18, A-19). The magistrate classified most of the incidents in this case as falling short of "offensive"; although acknowledging that petitioner was "genuinely offended" (Pet. App. A-19), the magistrate insisted that she was "more sensitive" than other female employees.(Pet. App. A-18).

This Court would dismiss out of hand such scholastic distinctions if they were made in a race discrimination case. The magistrate's analysis bears a substantial resemblance to the reasoning of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which insisted that racial segregation of railroad cars did not "stam[p] the colored race with a badge of inferiority", and that any such impression on the part of blacks existed only because "the colored race chooses to put that construction upon it." 163 U.S. at 551. The day is long past when this Court would entertain any suggestion that some forms of racial abuse are legal because "reasonable" blacks would not be offended. Undoubtedly there were many whites a generation ago who thought Rosa Parks "oversensitive" when she objected to sitting in the back of a Montgomery bus, or who believed Oliver Brown was "unreasonable" in asking that his daughter attend the white schools in Topeka. But the right to equal treatment accorded blacks by the Constitution and laws of the United States does not ebb and flow with popular or judicial notions of what forms of discrimination a "reasonable" black would find tolerable or "merely annoying".

Faced with a pattern of undisputed "denigrating" remarks (Pet. App. A-18), the magistrate classified most as "merely" "annoying", "insensitive", "inane" and "more objectionable" (Pet. App. A-18), none of which, he held, were sufficient, although pervading the workplace, to violate Title VII. It is inconceivable that the magistrate would have used, or that any court would have upheld, such a rating system had the remarks been racial in nature. Title VII surely does not authorize federal judges to draw such distinctions among epithets such as "nigger", "nigra", "spook", "coon", "jungle bunny" and "gorillas in the mist". A lower court decision dismissing some of these epithets as "merely

annoying and insensitive" would be reversed out of hand. Title VII does not permit federal judges to make similar distinctions regarding unwelcome sexual comments or conduct.

The lower court in this and other cases attempted to determine how much a "reasonable" woman would be offended by certain derogatory or unwelcome sexual remarks that were part of the conditions of her job. Those courts, not surprisingly, have arrived at complex and conflicting answers. We maintain that these decisions are asking the wrong question. The relevant inquiry is what forms of derogatory and unwelcome sexual remarks or conduct Title VII requires *any* woman to endure as a condition of her job. The answer is simple--*none*.

Neither this case, nor the numerous reported cases which we have reviewed, involve any genuine misunderstanding even by the perpetrator regarding what actions or derogatory remarks are likely to give offense[26]. The distinctions drawn by perpetrators concern not the substance of their actions, but the status and powerlessness of their victims. In dealing with women who exercise authority or control over their lives, men otherwise given to making abusive remarks act quite differently. In a context in which he was unprotected by his status as employer, Hardy would have had no difficulty recognizing that his comments were more than "merely annoying." It is unimaginable that Hardy, in applying for a business loan, would ever ask a female bank officer to take coins out of his pocket (Pet. App. A-9, A-18) or comment that her nipples were visible when the air conditioning was on. (Tr. 76) The churlish louts who shout obscenities at women on city streets often understand full well the offensiveness of their conduct; they assuredly do not use similar language when speaking with female personnel officials in the course of job interviews.

[26] Hardy acknowledged that he would not stand for it if someone talked to his wife or daughter the way he had spoken to petitioner. Tr.73; see tr. 47, 117.

The magistrate dismissed as peccadilloes Hardy's derogatory remarks, such as his repeated statements that women were not competent to do men's work. It is unlikely that either the magistrate or Hardy would take the same remarks as lightly if uttered about racial minorities. To put the matter bluntly, neither Hardy nor the magistrate would walk into a bar in Northeast Washington, D.C., and announce to the black patrons that only whites were competent to be sales managers. To the extent that the magistrate may actually have believed that women would find Hardy's actions "merely annoying", he was palpably mistaken. If Hardy were to approach a female patron at a Gold's Gym, and ask her, as he asked his employees, to bend over so that he could better observe her breasts (Tr.23-24), that "merely insensitive" remark might well place Hardy in need of immediate medical attention.

The use of this sort of "reasonable woman" standard has led defense lawyers to argue that any woman complaining about their client's conduct must be unreasonable, oversensitive, or worse. Defendants have sought to challenge plaintiffs' objections to sexual or gender-based harassment by seeking to discover information about their psychological or sexual histories[27]. The notion that objections to certain forms of discriminatory conditions and abuses may be "unreasonable" leads inevitably to arguments, reminiscent of the old Soviet system of remanding dissidents to mental hospitals, that women who object to unwelcome sexual acts or remarks must be unstable.

The magistrate expressed bafflement that petitioner had not chosen to rebuke her employer about his obnoxious actions. (Pet. App. A-15). That observation reflects the happy innocence of a federal official who serves for an eight year term under judges who serve for life. Ordinary American workers, who hold their jobs at the pleasure of their supervisors, do not ordinarily make a practice of rebuking their superiors for engaging in illegal and offensive

[27] *Priest v. Rotary*, 98 F.R.D. 755 (N.D.Cal. 1983).

conduct. Women and minorities often use the same word to describe individuals who confronted their bosses in this manner--unemployed.

It is extraordinary that a federal magistrate, a federal district court judge, and three circuit court judges could all have reviewed the facts in this case and have concluded that Title VII permits the abuses which occurred. That result reflects a profound misunderstanding of the commands of federal law. The decisions below proceed as though Title VII guaranteed only "employment opportunity sufficiently equal to satisfy a reasonable woman." The actual terms of Title VII call for "Equal Employment Opportunit[y]", period. 42 U.S.C. ch.21, subch.vi. We urge this Court to so hold.

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

Respectfully submitted,

ELAINE R. JONES
*ERIC SCHNAPPER
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-1900
Counsel for Amici
*Counsel of Record

APPENDICES

Appendix A —
Discrimination in Employer Mandated Terms of Employment

Appendix B —
Facially Neutral Harassment On Account of Race or Gender

Appendix C —
Race or Gender Specific Harassment

Appendix D —
Sexual Harassment

Appendix E —
Quid Pro Quo Sexual Demands

Appendix A
Discrimination in Employer-Mandated
Terms of Employment

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (plaintiff denied desirable assignment given to comparable male employees)

Carrero v. New York City Housing Authority, 890 F.2d 569 (2d Cir. 1989) (plaintiff denied desired assignment)

Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989) (plaintiff given excessive work)

Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989) (unequal treatment regarding visitors, phone usage, and assignments)

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (discrimination regarding days off)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (unequal rest and dwelling areas for male and female residents; female residents expected to cook for other doctors; female residents denied assignments given to male residents)

Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989) (plaintiff denied needed training)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (discrimination in job assignments, hours, and vacation times)

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (plaintiff directed to jump off five foot loading dock; not permitted to sit down; denied lunch break)

Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986) (plaintiff assigned to do the work of two men; denied adequate training)

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1988) (plaintiff denied entertainment privileges; barred from firm golf matches; not permitted, as were her predecessors, to take customers to lunch; required, despite management position, to sit with clerical workers at meeting)

Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986) (plaintiffs barred from more desirable positions; barred from use of white bathroom)

Carroll v. Talman Federal Savings and Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979) (female but not male bank employees required to wear uniforms)

Harrington v. Vandalia-Butler Board of Education, 585 F.2d 192 (6th Cir. 1978) (male but not female physical education instructors provided with offices and with showers and lockers not shared with students)

Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C.Cir. 1976) (assignment of bus routes)

Rodgers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (hispanic employee required to attend patients segregated on the basis of national origin)

Appendix B
Facially Neutral Harassment On Account of Race or Gender

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992) (co-worker called plaintiff vulgar names, deliberately placed need materials where she could not reach them)

Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (co-worker threatened to "whip" or "beat" plaintiff and injure his four-year-old son; bullet fired into plaintiff's home)

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (plaintiff's case files stolen and destroyed; fellow workers refused to provide plaintiff routine assistance; plaintiffs car repeatedly vandalized; anonymous harassing phone calls; plaintiff burned by lime placed on her clothes)

Carrero v. New York City Housing Authority, 890 F.2d 569 (2d Cir. 1989) (spurned supervisor referred to plaintiff as a "scarecrow"; threatened to fail plaintiff on her probationary report; criticized plaintiff publicly)

Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (threat by supervisor to kill plaintiff)

Wheeler v. Southland Corp., 875 F.2d 1246 (6th Cir. 1989) (supervisor critical of plaintiff's job performance)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (female residents told they were to "lick the floor" if ordered to do so)

Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989) (plaintiff's work sabotaged; noose repeatedly tied over her desk)

Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988) (plaintiff's time card altered)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (ridicule of plaintiff's appearance; interference with plaintiff's sales efforts)

Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988) (co-workers urinated in plaintiff's water bottle and gas tank; refused to fix carbon monoxide leak in her company truck)

Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) (disparaging remarks about plaintiff's age and weight; non-sexual prank in presence of federal officials)

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (co-worker choked plaintiff)

Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986) (plaintiff slapped by co-worker)

Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) (co-workers sabotaged and hid plaintiff's tools; sabotaged his work; hang-man's noose)

Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) (nasty pranks)

Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986) (plaintiff's car vandalized; harassing phone calls)

Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497 (11th Cir. 1985) (supervisor yelled at plaintiff; talked to her as if she were two year old and two inches high)

McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) (supervisor grabbed and twisted plaintiff's arm, causing serious physical injury)

Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (physical threats)

DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1979) (firefighting equipment sabotaged; threatening notes; "silent treatment" by co-workers)

Appendix C
Race or Gender Specific Harassment

Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (co-workers told "nigger jokes"; nicknamed plaintiff "Buckwheat"; teased plaintiff when he conversed with white women; hung black dummy from noose; wrote "KKK" and "All niggers must die" on bathroom walls; wrote "hi Bob KKK" on building; called plaintiff "nigger" and "dumb nigger")

Andrews v. City of Philadelphia, 895 F.2d 1475 (3d Cir. 1990) (supervisor objected, "Why don't you stay in one [office] like a man")

EEOC v. Beverage Canners, Inc., 897 F.2d 1067 (11th Cir. 1990) (supervisors made racially derogatory remarks and used epithets such as "niggers" and "swahilis"; asserted "blacks were meant to be slaves" and were of lower intelligence)

Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989) (plaintiff repeatedly referred to as a "Fucking bitch" on company radio)

Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989) (racial slurs by eight supervisors or co-workers, such as "chink", "tight eye" and "damned foreigner")

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (supervisor made numerous crude and disparaging remarks about pregnancy; stated he did not like "stupid women who have kids"; referred to plaintiffs as "dog" "whore" and "slut")

Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (numerous explicit racial remarks by supervisor)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (repeated remarks to female surgery residents that women were not competent to be surgeons)

Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988) (racial slurs)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (plaintiff called "bitch" and "whore")

North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401 (7th Cir. 1988) (racial slurs)

Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988) ("blond bitch" written on outside of plaintiff's car; plaintiffs referred to repeatedly as "Fucking Flag girls")

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) ("niggers"; "coons"; "lazy niggers and Mexicans")

Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986) ("monkey")

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (supervisor stated regarding plaintiff's position, "we really need a man in that job"; co-worker routinely used anti-female obscenities)

Hunter v. Alls-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1988) (bulletin board graffiti such as "the KKK is not dead, nigger"; and "open season on coons"; racially derogatory notes such as "save this mess for the nigger")

Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) (racial slurs)

Snell v. Suffolk County, 782 F.2d 1094 (2d Cir. 1986) ("nigger", "coon", "spic", "black bitch"; numerous racially derogatory literature and cartoons)

Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) ("wetback"; "tomato picker"; plaintiff told to go back to Mexico so that a white person could have his job; "hot headed Mexican")

Craik v. Minnesota State University Board, 731 F.2d 465 (8th Cir. 1984) (male faculty members objected to woman teaching statistics; student told women should just be para-professionals, and did not need graduate degrees; "we'll be stuck with a woman")

Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (racial remarks and derogatory epithets; racial oriented graffiti; racial cartoon on police headquarters bulletin board)

Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) ("nigger"; "coon"; "blackboy"; "That's just like a nigger"; "KKK Headquarters" written on facade of tool shed)

Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1980) (numerous racial slurs, epithets and jokes; "niggers"; "spooks"; "uppity nigger"; "boy"; "Let's go finish the niggers"; announced KKK member hung hangman's noose; joke ending with the punch line, "Oh, don't worry about it, we're just barbecuing a few niggers")

DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1980) (series of threatening notes, such as "hey boy get your Black ass out Before *you* don't have *one*")

Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978) (epithets such as "niggers", "nigras", and "spear chuckers"; black section of city referred to as the "Congo"; statements that black firefighters are not competent; hog trough set in front of black firefighter at dinner)

Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) ("dago")

Appendix D
Sexual Harassment

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992) (supervisor remarked "have you been playing with yourself"; discussed sex; asked plaintiff to watch pornographic movies; made lewd gestures, such as imitating masturbation; asked for dates at least weekly; proposed oral sex so plaintiff would "be able to perform [her] work better"; proposed plaintiff pose nude for him in return for overtime pay; co-worker called plaintiff obscene names)

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (bizarre messages from co-worker referring to non-existent romantic relationship)

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (plaintiffs called obscene names; display of pornographic pictures in locker room shared by male and female officers; supervisor breathed heavily down plaintiff's neck; pornographic pictures placed on office walls and in plaintiff's desk; sexual devices placed in plaintiff's desk; anonymous obscene phone calls)

Carrero v. New York City Housing Authority, 890 F.2d 569 (2d Cir. 1989) (co-worker dropped pants in front of plaintiff; supervisor repeatedly kissed plaintiff's neck, stroked her arm and knee)

Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989) (repeated references to plaintiff's breasts; supervisor stated he "had gotten a 'hard-on' watching her; obscene jokes on company radio)

EEOC v. Hacienda Hotel, 881 F.2d 1504 (8th Cir. 1989) (supervisor comments about plaintiff's "ass"; reference to oral sex; suggestion of sodomy; offer of money if plaintiff would "give him [her] body")

Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (numerous explicit sexual remarks by supervisor; supervisor showed plaintiff pornographic photograph of interracial sodomy, commenting plaintiff was hired for that purpose; supervisor showed plaintiff racist pornographic picture involving bestiality, threatening that was how plaintiff "was going to end up")

Paroline v. Unysis Corp., 879 F.2d 100 (4th Cir. 1989) (numerous sexual comments and unwanted touching of female employees by supervisor and other men; supervisor repeatedly kissed plaintiff over her objections)

Wheeler v. Southland Corp., 875 F.2d 1246 (6th Cir. 1946) (supervisor repeatedly leaned against plaintiff, touched her hips, called her "honey" or "baby"; asked why she did not hire women with big breasts)

Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989) (numerous sexual advances; rape)

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) (numerous sexual jokes; requests for sexual favors; proposal that plaintiffs visit supervisor on his couch; "suggestive" comments on plaintiffs' attire)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (explicit discussion of desire to have sex; *Playboy* centerfolds and sexually explicit drawing of plaintiff posted in meeting room; sexual nicknames for women residents; explicit remarks about bodies of

plaintiff and other women; bragging about sexual exploits)

Bennett v. Corron & Black Corp., 845 F.2d 104 (5th Cir. 1988) (cartoons posted in public men's room depicting plaintiff, and bearing her name, engaged in crude and deviant sexual activity)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) ("we're going to take your clothes off to see if you are real")

Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1986) (plaintiffs repeatedly asked by co-workers if they "wanted to fuck" or engage in oral sex; co-workers grabbed breasts or rubbed thighs of plaintiffs; co-workers mooned or exposed themselves to plaintiffs; flashed at plaintiffs obscene photographs)

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (supervisor grabbed plaintiff's thigh; supervisor touched plaintiff's buttocks, stating "I'm going to get you yet"; supervisor grabbed plaintiff's breasts, stating "I got you")

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) (facility manager repeatedly touched plaintiffs shoulders and hair; inquired if she could become pregnant; made remark described by district court as "too sexually explicit" to repeat)

Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) (co-worker allegedly grabbed plaintiff's genitals; repeatedly made sexually explicit and other obscene remarks to her; exposed himself to her; responded to plaintiff's objections by warning "I haven't even started on you yet")

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (co-worker touched plaintiff's hips and breasts; dropped his pants; stated "Let's get naked and go to my room")

Yates v. Avco Corporation, 819 F.2d 630 (6th Cir. 1987) (supervisor repeatedly proposed sexual relations, made sexually suggestive comments, lewd references to plaintiff's body, and lewd jokes; asserted he was putting plaintiff "on his mistress list"; asked plaintiff into his office so he could watch her walk out and "make groaning sounds")

Highlander v. K.F.C. National Management Co., 805 F.2d 644 (6th Cir. 1988) (supervisor touched plaintiff's legs and buttocks)

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1985) (fellow employee remarked of plaintiff, "All that bitch needs is a good lay")

Bohen v. City of East Chicago, Ind., 799 F.2d 1150 (7th Cir. 1986) (supervisor grabbed plaintiff's crotch; repeatedly discussed his sexual tastes and expectations of her; rubbed his pelvis against her buttocks; co-workers directed obscene comments at plaintiff; another supervisor informed plaintiff that she should be forcibly raped)

Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986) (co-workers slapped plaintiff's buttocks; commented she must "moan and groan" while having sex; supervisor repeatedly suggested he give plaintiff rubdown; responded to requests for assistance, "What will I get for it?")

Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1988) (supervisor proposed to take plaintiff to a hotel because she needed the "comfort of a man"; numerous other advances; corporate vice-president rebuked plaintiff when she expressed distaste of female employees at use of figures of bare-breasted mermaids as table decorations)

McKinney v. Dole, 765 F.2d 1129 (D.C.Cir. 1985) (supervisor asked for sexual favors, rubbed himself against her, exposed himself)

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985) (supervisor made repeated sexual advances, made lewd comments and obscene gestures, brushed against breasts of female workers)

Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984) (supervisor talked about sexual activity; touched plaintiff in an offensive manner)

Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) (supervisor repeatedly demanded sexual relations, discussed particular types of sexual activities)

Katz v. Dove, 709 F.2d 251 (4th Cir. 1983) ("extremely vulgar and offensive sexually explicit epithets"

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (chief of police subjected female subordinates to repeated requests for sexual relations, vulgar comments, and sexual inquiries)

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (supervisors repeatedly sought sexual relationships; asked about sexual proclivities; "any man in his right mind would want to rape you")

Appendix E
Quid Pro Quo Sexual Demands

Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992) (supervisor whose advances had been rejected warned plaintiff, "You must not need your job very bad"; supervisor warned plaintiff he would let other employees force her dismissal "If you don't go out with me")

EEOC v. Hacienda Hotel, 881 F.2d 1504 (8th Cir. 1989) (threat of dismissal if sexual advances rejected; promise of immunity from dismissal if plaintiff would have sex with him)

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (female residents warned to obtain protection of senior residents by providing sexual favors)

Jordan v. Clark, 847 F.2d 1368 (8th Cir. 1988) (supervisor suggested plaintiff sleep with him in order to keep her job and get a promotion)

Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (plaintiff warned co-workers would obstruct her sales efforts if she did not go out with them)

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) (facility manager whose sexual advances were not accepted threatened "your fate is in my hands" and "revenge is the name of the game")

Highlander v. K.F.C. National Management Co., 805 F.2d 644 (6th Cir. 1986) (supervisor told plaintiff if she was interested in becoming a manager "there is a motel across the street")

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985) (supervisor told plaintiff it would be "easy" for her at office if she went out with him; supervisor promised raise if female employee would "cooperate" with him)

Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (plaintiff fired for refusing to have sexual relations with her foreman)

Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) (plaintiff fired for refusing to have sexual relations with supervisor)

Phillips v. Smalley Maintenance Services, 711 F.2d 1524 (11th Cir. 1983) (plaintiff fired for refusing to have sexual relations with supervisor)

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (plaintiff fired for refusing to have sexual relations with supervisor)

Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977)(plaintiff warned by male supervisor that she would be fired unless she engaged in sexual relations)